UNITED STATES OF AMERICA
BEFORE THE NATIONAL LABOR RELATIONS BOARD
REGION 10

Employer

and **Case 10-RD-149908**

TEST ACCOUNT

Petitioner

and

Union

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DECISION AND DIRECTION OF ELECTION

NOTE: ***Use this template when employer argues that certain classifications sought by petitioner do not share a community of interest with one another and therefore should be excluded from unit (thus, analysis does not cite Specialty Healthcare)***

Petitioner seeks to represent a unit of all full-time and regular part-time (identify classifications sought) employed by the Employer at its (identify location) facility. The Employer maintains that the unit sought by Petitioner is not appropriate because (describe classifications) should be excluded from the unit. Petitioner and the Employer agree that the unit should include (identify classifications) and exclude (identify classifications the parties agree to exclude).

A hearing officer of the Board held a hearing in this matter and the parties (orally argued their respective positions prior to the close of the hearing) (subsequently filed briefs with me). As explained below, based on the record and relevant Board law, I find that (the unit sought by

Petitioner is appropriate) (the unit sought by Petitioner is not appropriate insofar as the (classifications) should not be included).

THE EMPLOYER'S OPERATION

(Include in this section the facts describing the Employer's business and operation, including if desired a description of the supervisory hierarchy. Include the facts necessary to provide a context for the issues to be discussed below and any other facts that are important that you do not intend to discuss under the various factors determining community of interest).

BOARD LAW

When determining an appropriate unit, the Board delineates the grouping of employees within which freedom of choice may be given collective expression. At the same time it creates the context within which the process of collective bargaining must function. Therefore, each unit determination must foster efficient and stable collective bargaining. *Gustave Fisher, Inc*., 256 NLRB 1069 (1981). On the other hand, the Board has also made clear that the unit sought for collective bargaining need only be an appropriate unit. Thus, the unit sought need not be the ultimate, or the only, or even the most appropriate unit. *Overnite Transportation Co*., 322 NLRB 723, at 723 (1996). As a result, in deciding the appropriate unit, the Board first considers whether the unit sought in a petition is appropriate. Id. When deciding whether the unit sought in a petition is appropriate, the Board focuses on whether the employees share a "community of interest." *NLRB v. Action Automotive,* 469 U.S. 490, 494 (1985). In turn, when deciding whether a group of employees shares a community of interest, the Board considers whether the employees sought are organized into a separate department; have distinct skills and training; have distinct job functions and perform distinct work, including inquiry into the amount and type of job overlap between classifications; are functionally integrated with the Employer's other employees; have frequent contact with other employees; interchange with other employees; have distinct terms and conditions of employment; and are separately supervised. *United Operations, Inc*., 338 NLRB 123 (2002). Particularly important in considering whether the unit sought is appropriate are the organization of the plant and the utilization of skills. *Gustave Fisher, Inc*., supra at fn. 5. With regard to organization of the plant, the Board has made clear that it will not approve of fractured units – that is, combinations of employees that are too narrow in scope or that have no rational basis. *Seaboard Marine*, 327 NLRB 556 (1999). However, *all* relevant factors must be weighed in determining community of interest.

APPLICATION OF BOARD LAW TO THE FACTS OF THIS CASE

Organization of the Plant

An important consideration in any unit determination is whether the proposed unit conforms to an administrative function or grouping of an employer's operation. Thus, for example, generally the Board would not approve a unit consisting of some, but not all, of an

employer's production and maintenance employees. See, *Check Printers, Inc.* 205 NLRB 33 (1973). However, in certain circumstances the Board will approve a unit in spite of the fact that other employees in the same administrative grouping are excluded. *Home Depot USA,* 331 NLRB 1289, 1289 and 1291 (2000). In this case, the unit sought by Petitioner (conform(s) to an administrative grouping of the Employer. The record is clear that - cite record facts) (is arbitrary in that is does not conform to an administrative grouping, while the Employer's proposal to exclude certain classifications is based in part on the fact that the classifications the Employer seeks to exclude are not part of an administrative grouping with the remainder of the employees sought. Rather, approval of the unit sought by Petitioner could lead to fractured units – groups of employees that are not rational. *Seaboard Marine*, supra).

Interchangeability and Contact among Employees

Interchangeability refers to temporary work assignments or transfers between two groups of employees. Frequent interchange "may suggest blurred departmental lines and a truly fluid work force with roughly comparable skills." *Hilton Hotel Corp*., 287 NLRB 359, 360 (1987). As a result, the Board has held that the frequency of employee interchange is a critical factor in determining whether employees who work in different groups share a community of interest sufficient to justify their inclusion in a single bargaining unit. *Executive Resource Associates*, 301 NLRB 400, 401 (1991), citing *Spring City Knitting Co. v. NLRB*, 647 F.2d 1011, 1015 (9th Cir. 1081). In this case, the record (fails to reveal) (reveals) evidence of significant employee interchange between the employees the parties agree are in the unit and the employees the Employer seeks to exclude. More specifically, the record reveals that (cite record facts).

Also relevant for consideration with regard to interchangeability is whether there are permanent transfers among employees in the unit sought by a union. However, the existence of permanent transfers is not as important as evidence of temporary interchange. *Hilton Hotel Corp*, supra. In this matter the record reveals (little) (some) evidence of permanent transfers between the employees the parties agree are in the unit and the employees the Employer seeks to exclude. (This evidence includes . . .)

Also relevant is the amount of work-related contact among employees, including whether they work beside one another. Thus, it is important to compare the amount of contact employees in the unit sought by a union have with one another. See for example, *Casino Aztar*, 349 NLRB 603, 605-606 (2007). (There is evidence of significant work-related contact between the employees the parties agree are in the unit and the employees the Employer seeks to exclude, as well as evidence that the two groups of employees work in the same areas. The evidence of work related contact includes . . . The evidence that the two groups work in the same areas includes . . .) (There is little evidence of work-related contact between the employees the parties agree are in the unit and the employees the Employer seeks to exclude, and little or no evidence that they work in the same areas.) (In comparison, the employees the parties agree are in the unit appear to have regular day-to-day contact with one another and work side-by-side).

Common Supervision

Another community-of-interest factor is whether the employees in dispute are commonly supervised. In examining supervision, most important is the identity of employees' supervisors who have the authority to hire, to fire or to discipline employees (or effectively recommend those actions) or to supervise the day-to-day work of employees, including rating performance, directing and assigning work, scheduling work providing guidance on a day-to-day basis. *Executive Resources Associates*, supra at 402; *NCR Corporation*, 236 NLRB 215 (1978). Common supervision weighs in favor of placing the employees in dispute in one unit. However, the fact that two groups are commonly supervised does not mandate that they be included in the same unit, particularly where there is no evidence of interchange, contact or functional integration. *United Operations*, supra at 125. Similarly, the fact that two groups of employees are separately supervised weighs in favor of finding against their inclusion in the same unit. However, separate supervision does not mandate separate units. *Casino Aztar*, supra at 607, fn 11. Rather, more important is the degree of interchange, contact and functional integration. Id. at 607.

In this case the record reveals that (the employees the parties agree are in the unit are separately supervised from employees the Employer seeks to exclude from the unit) (the employees the parties agree are in the unit are not separately supervised from the employees the Employer seeks to exclude from the unit). More specifically,

The Nature of Employee Skills and Functions

This factor examines whether disputed employees can be distinguished from one another on the basis of job functions, duties or skills. If they cannot be distinguished, this factor weighs in favor of including the disputed employees in one unit. Evidence that employees perform the same basic function or have the same duties, that there is a high degree of overlap in job functions or of performing one another's work, or that disputed employees work together as a crew, support a finding of similarity of functions. Evidence that disputed employees have similar requirements to obtain employment; that they have similar job descriptions or licensure requirements; that they participate in the same Employer training programs; and/or that they use similar equipment supports a finding of similarity of skills. *Casino Aztar*, 349 NLRB 603 (2007); *J.C. Penny Company*, *Inc*., 328 NLRB 766 (1999); *Brand Precision Services*, 313 NLRB 657 (1994); *Phoenician*, 308 NLRB 826 (1992). Where there is also evidence of similar terms and conditions of employment and some functional integration, evidence of similar skills and functions can lead to a conclusion that disputed employees must be in the same unit, in spite of lack of common supervision or evidence of interchange. *Phoenician*, supra.

(In this case the record reveals that employees the parties agree are in the unit cannot be distinguished from the employees the Employer contends should be excluded from the unit on the basis of job functions, duties or skills. More specifically, the record reveals that . . .) (In this case the record reveals that employees the parties agree are in the unit have separate job functions, duties and skills from the employees the Employer contends must be excluded from the unit. More specifically, the record reveals that . . .)

Degree of Functional Integration

Functional integration refers to when employees' work constitutes integral elements of an employer's production process or business. Thus, for example, functional integration exists when employees in a unit sought by a union work on different phases of the same product or as a group provides a service. Another example of functional integration is when the Employer's work flow involves all employees in a unit sought by a union. Evidence that employees work together on the same matters, have frequent contact with one another, and perform similar functions is relevant when examining whether functional integration exists. *Transerv Systems*, 311 NLRB 766 (1993). On the other hand, if functional integration does not result in contact among employees in the unit sought by a union, the existence of functional integration has less weight.

In this matter the record reveals that (the employees the parties agree are in the unit and the employees the Employer maintains should be excluded are functionally related. More specifically . . .) (the employees the parties agree are in the unit and the employees the Employer would exclude from the unit are not functionally related. More specifically . . .)

Terms and Conditions of Employment

Terms and conditions of employment include whether employees receive similar wage ranges and are paid in a similar fashion (for example hourly); whether employees have the same fringe benefits; and whether employees are subject to the same work rules, disciplinary policies and other terms of employment that might be described in an employee handbook. However, the facts that employees share common wage ranges and benefits or are subject to common work rules does not warrant a conclusion that a community of interest exists where employees are separately supervised, do not interchange and/or work in a physically separate area. *Bradley Steel, Inc*., 342 NLRB 215 (2004); *Overnite Transportation Company*, 322 NLRB 347 (1996). Similarly, sharing a common personnel system for hiring, background checks and training, as well as the same package of benefits, does not warrant a conclusion that a community of interest exists where two classifications of employees have little else in common. *American Security Corporation,* 221 NLRB 1145 (1996).

In the instant case the record reveals that employees who the Employer argues must be excluded from the unit share (some) common terms and conditions of employment with employees who the parties agree are in the unit. These include (specify). (On the other hand, the employees who the Employer contends must be excluded from the unit have a number of different terms and conditions of employment. These include (specify))

NOTE: If it exists, bargaining history is also relevant. Particularly when bargaining history is recent and applicable to the parties involved in the case, it is given substantial weight. See, generally Section 12-220 of An Outline of Law and Procedure in Representation Cases. On the other hand, the Board will not adhere to bargaining history "where the unit does not conform

reasonably well to other standards of appropriateness." *Crown Zellerbach Corp*., 246 NLRB 202,203 (1979). For a case where the Board refused to accept bargaining history as controlling see, *Turner Industries Group, LLC*., 349 NLRB 482 (2007).

CONCLUSION

In determining that the unit sought by Petitioner is (is not) appropriate, I have carefully weighed the community-of-interest factors cited in *United Operations*, supra. I conclude that the unit sought by Petitioner is (is not) appropriate because the record reveals that (specify the factors relied on for the conclusion). (In view of my conclusion that the unit sought by Petitioner is not appropriate, I conclude that the appropriate unit is . . .)

Based upon the entire record in this matter and in accordance with the discussion above, I conclude and find as follows:

1. The hearing officer's rulings made at the hearing are free from prejudicial error and are hereby affirmed.

2. The Employer is engaged in commerce within the meaning of the Act, and it will effectuate the purposes of the Act to assert jurisdiction herein. [PUBLISH THIS TEMPLATE FIRST, THEN CREATE A FOOTNOTE HERE FOR COMMERCE DATA]

3. The Petitioner is a labor organization within the meaning of Section 2(5) of the Act and claims to represent certain employees of the Employer. (Modify if there is an Intervenor)

4. A question affecting commerce exists concerning the representation of certain employees of the Employer within the meaning of Section 9(c)(1) and Section 2(6) and (7) of the Act.

5. The following employees of the Employer constitute a unit appropriate for the purpose of collective bargaining within the meaning of Section 9(b) of the Act:

(Describe unit)

NOTE: If you are not directing an election in the unit sought by Petitioner, you are directing an election in a unit smaller than that sought by Petitioner. If Petitioner has not agreed to an election in the smaller unit, the petition should be dismissed and the name of this document should be Decision and Order. If petitioner has indicated a willingness to go to an election in the smaller unit (or not taken a position at the hearing) you should direct an election in the smaller unit.

DIRECTION OF ELECTION

The National Labor Relations Board will conduct a secret ballot election among the employees in the unit found appropriate above. Employees will vote whether or not they wish to be represented for purposes of collective bargaining by .

A. Election Details

The election will be held on [scheduled election date] from [election scheduled times] at [scheduled election place]. *(NOTE: It is NOT necessary to explain why dates and times were chosen)*

B. Voting Eligibility

Eligible to vote are those in the unit who were employed during the payroll period ending **(insert payroll eligibility date)**, including employees who did not work during that period because they were ill, on vacation, or temporarily laid off.

Employees engaged in an economic strike, who have retained their status as strikers and who have not been permanently replaced, are also eligible to vote. In addition, in an economic strike that commenced less than 12 months before the election date, employees engaged in such strike who have retained their status as strikers but who have been permanently replaced, as well as their replacements, are eligible to vote. Unit employees in the military services of the United States may vote if they appear in person at the polls.

[*If applicable, add:* Also eligible to vote using the Board's challenged ballot procedure are those individuals employed in the classifications whose eligibility remains unresolved as specified above and in the Notice of Election.

Ineligible to vote are (1) employees who have quit or been discharged for cause since the designated payroll period; (2) striking employees who have been discharged for cause since the strike began and who have not been rehired or reinstated before the election date; and (3) employees who are engaged in an economic strike that began more than 12 months before the election date and who have been permanently replaced.

C. Voter List

As required by Section 102.67(l) of the Board's Rules and Regulations, the Employer must provide the Regional Director and parties named in this decision a list of the full names, work locations, shifts, job classifications, and contact information (including home addresses, available personal email addresses, and available home and personal cell telephone numbers) of all eligible voters.

To be timely filed and served, the list must be *received* by the regional director and the parties by **(date – use date two business days after date of issuance unless RD found**

extraordinary circumstances and directs otherwise). The list must be accompanied by a certificate of service showing service on all parties. **The region will no longer serve the voter list.**

Unless the Employer certifies that it does not possess the capacity to produce the list in the required form, the list must be provided in a table in a Microsoft Word file (.doc or docx) or a file that is compatible with Microsoft Word (.doc or docx). The first column of the list must begin with each employee's last name and the list must be alphabetized (overall or by department) by last name. Because the list will be used during the election, the font size of the list must be the equivalent of Times New Roman 10 or larger. That font does not need to be used but the font must be that size or larger. A sample, optional form for the list is provided on the NLRB website at www.nlrb.gov/what-we-do/conduct-elections/representation-case-rules-effective-april-14-2015.

When feasible, the list shall be filed electronically with the Region and served electronically on the other parties named in this decision. The list may be electronically filed with the Region by using the E-filing system on the Agency's website at www.nlrb.gov. Once the website is accessed, click on **E-File Documents**, enter the NLRB Case Number, and follow the detailed instructions.

Failure to comply with the above requirements will be grounds for setting aside the election whenever proper and timely objections are filed. However, the Employer may not object to the failure to file or serve the list within the specified time or in the proper format if it is responsible for the failure.

No party shall use the voter list for purposes other than the representation proceeding, Board proceedings arising from it, and related matters.

D. Posting of Notices of Election

Pursuant to Section 102.67(k) of the Board's Rules, the Employer must post copies of the Notice of Election accompanying this Decision in conspicuous places, including all places where notices to employees in the unit found appropriate are customarily posted. The Notice must be posted so all pages of the Notice are simultaneously visible. In addition, if the Employer customarily communicates electronically with some or all of the employees in the unit found appropriate, the Employer must also distribute the Notice of Election electronically to those employees. The Employer must post copies of the Notice at least 3 full working days prior to 12:01 a.m. of the day of the election and copies must remain posted until the end of the election. For purposes of posting, working day means an entire 24-hour period excluding Saturdays, Sundays, and holidays. However, a party shall be estopped from objecting to the nonposting of notices if it is responsible for the nonposting, and likewise shall be estopped from objecting to the nondistribution of notices if it is responsible for the nondistribution.
Failure to follow the posting requirements set forth above will be grounds for setting aside the election if proper and timely objections are filed.

RIGHT TO REQUEST REVIEW

Pursuant to Section 102.67 of the Board's Rules and Regulations, a request for review may be filed with the Board at any time following the issuance of this Decision until 14 days after a final disposition of the proceeding by the Regional Director. Accordingly, a party is not precluded from filing a request for review of this decision after the election on the grounds that it did not file a request for review of this Decision prior to the election. The request for review must conform to the requirements of Section 102.67 of the Board's Rules and Regulations.

A request for review may be E-Filed through the Agency's website but may not be filed by facsimile. To E-File the request for review, go to www.nlrb.gov, select E-File Documents, enter the NLRB Case Number, and follow the detailed instructions. If not E-Filed, the request for review should be addressed to the Executive Secretary, National Labor Relations Board, 1015 Half Street SE, Washington, DC 20570-0001. A party filing a request for review must serve a copy of the request on the other parties and file a copy with the Regional Director. A certificate of service must be filed with the Board together with the request for review.

Neither the filing of a request for review nor the Board's granting a request for review will stay the election in this matter unless specifically ordered by the Board.

Dated:

JOHN D. DOYLE, JR.
REGIONAL DIRECTOR
NATIONAL LABOR RELATIONS BOARD
REGION 10
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Harris Tower Ste 1000
Atlanta, GA 30303-1504